Supreme Court, U. S.
FILED
JUN 5 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-922

CHRYSLER CORPORATION, *Petitioner,*

v.

HAROLD BROWN, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR HUGHES AIRCRAFT COMPANY AS AMICUS CURIAE

LATHAM & WATKINS
THOMAS L. PFISTER
GEORGE H. WU
555 South Flower Street
Los Angeles, California 90071

Attorneys for Hughes Aircraft Company as Amicus Curiae

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QUESTIONS PRESENTED

1. Whether the fourth exemption to the Freedom of Information Act, 5 U.S.C. § 552(b)(4), was intended by Congress to protect the confidentiality of all information of a commercial or financial nature submitted to the government by a private party which would customarily not be released to the public by the party from whom it was obtained.

2. In light of the purpose and proper scope of the fourth exemption to the Freedom of Information Act:

(a) Whether a person who has supplied to the government information claimed to be within the fourth exemption is entitled to a trial *de novo* in a federal court action to prevent government disclosure of such information;

(b) Whether the government may disclose information which falls within that exemption; and

(c) Whether the agency regulations in 41 C.F.R. Part 60-40 may authorize disclosure of information which falls within that exemption.

INTEREST OF HUGHES AIRCRAFT COMPANY

In 1974, Hughes Aircraft Company (*"Amicus"*) sued to enjoin the government from releasing a written affirmative action plan ("AAP") which it developed for one of its facilities.[1] The district court denied the relief sought by *Amicus,*[2] but granted an injunction restraining disclosure of the information at issue pending resolution of *Amicus'* appeal to the Ninth Circuit Court of Appeals.

On May 5, 1976, *Amicus* argued its appeal before the Ninth Circuit and the matter was submitted for decision.

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[1] *Amicus* is a privately held Delaware corporation which transacts business throughout the United States. A substantial portion of its business consists of fulfilling contracts or subcontracts with various United States Government agencies. As a government contractor, *Amicus* is required to develop an affirmative action program in accordance with Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), and regulations promulgated thereunder. The affirmative action program can be broadly described as various positive efforts by the contractor to insure and promote the maximum utilization in its work force of available minorities and females in the labor market.

In order to monitor affirmative action programs, the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") and its various compliance agencies conduct both on-site and off-site reviews of each contractor's program. To facilitate the off-site review process, compliance agencies require each contractor to submit certain written information regarding the affirmative action program. This written information termed an Affirmative Action Plan (sometimes referred to herein as "AAP") is the subject of *Amicus'* suit referred to in the text and the case before this Court.

[2] *Hughes Aircraft Company v. Schlesinger,* 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending,* No. 75-1064 (9th Cir.).

On April 14, 1977, the Ninth Circuit withdrew the case from submission pending this Court's ruling on the government's petition for certiorari in a related case.[3] Upon this Court's denial of certiorari in that case, *Amicus'* appeal was again submitted for decision in May, 1977. *Amicus* has advised the Ninth Circuit that the petition for certiorari was granted in the instant case, and *Amicus* does not anticipate a decision by the Ninth Circuit prior to this Court's decision.

Many of the issues raised in *Amicus'* appeal to the Ninth Circuit are substantially identical to those raised in the instant case. Because the Ninth Circuit is obviously awaiting guidance from this Court on those issues, *Amicus* has a vital interest in the outcome of this case.

Moreover, one of the issues presented by *Amicus* to the Ninth Circuit is whether the district court applied an erroneous test in determining that the information at issue did not fall within the fourth exemption to the Freedom of Information Act, 5 U.S.C. § 552(b)(4).[4] In the instant case, the district court found that substantially identical information *was* within the fourth exemption and this finding was not challenged by the government on appeal.[5] *Amicus* submits that a proper resolution of the questions presented by petitioner in this case demands a full consideration by this Court of the threshold issue of the purpose and scope of the fourth exemption. *Amicus* therefore has a special interest in briefing

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[3] *Westinghouse Electric Corp. v. Schlesinger,* 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub nom., Brown v. Westinghouse Electric Corp.,* 431 U.S. 924 (1977).

[4] Section 552(b)(4) exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential".

[5] *Chrysler Corporation v. Schlesinger,* 565 F.2d 1172, 1182-1183 (3rd Cir. 1977), *cert. granted sub nom., Chrysler Corporation v. Brown,* No. 77-922, 46 U.S.L.W. 3555 (March 7, 1978.) *See also* Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 13-14.

the Court on this threshold issue and demonstrating the impact of its resolution upon each of the questions presented by petitioner.

INTRODUCTION AND SUMMARY OF ARGUMENT

Each of the three questions presented by petitioner raises the same fundamental "subsidiary question fairly comprised therein",[6] *i.e.*, what is the proper scope of the fourth exemption to the Freedom of Information Act, 5 U.S.C. § 552(b)(4)? *Amicus* submits that the fourth exemption was intended by Congress to protect the confidentiality of all information of a commercial or financial nature submitted to the government by a private party which "would customarily not be released to the public by the person from whom it was obtained."[7] This definition of the scope of the fourth exemption is amply supported by the legislative history and is consistent with the fundamental purposes of the Freedom of Information Act as applied to information submitted by private parties to the government.

Nevertheless, under the "prevailing" judicial interpretation of the scope of the fourth exemption initially set forth in *National Parks & Conservation Ass'n. v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*"National Parks I"*), protection is afforded only to that commercial or financial information submitted to the government by a private party which, if disclosed, is likely to cause substantial harm to the competitive position of the submitter. Such a restrictive interpretation of the scope of the exemption is contrary to the legislative history and inconsistent with the basic purposes of the Act.

[6] Rule 23(1)(c) of the Revised Rules of the United States Supreme Court. *Cf. Blonder-Tongue Lab., Inc. v. University of Illinois Found.*, 402 U.S. 313, 320 n.6 (1971).

[7] S. Rept. No. 813, 89th Cong., 1st Sess. 9 (1965).

The primary purpose of this *Amicus* Brief is to demonstrate that a threshold determination by this Court of the purpose and scope of the fourth exemption is essential to the proper resolution of each of the specific questions presented by petitioner. In particular:

(1) With respect to the question of *de novo* review, if the fourth exemption were properly construed as protecting the confidentiality of all commercial information submitted to the government which "would customarily not be released to the public by the person from whom it was obtained", administrative agencies charged with the initial disclosure decision would be capable of making a rational determination of the applicability of the exemption — notwithstanding the narrow time frame allotted by the Act for such a decision.[8] The question whether such information was "customarily disclosed" to the public would turn on evidence of procedures adopted internally by the submitter to limit dissemination of the information or, perhaps, evidence of treatment of similar information by other submitters. If judicial review of a decision to disclose were necessary, a federal court may be able to ascertain from the administrative record alone whether the agency properly determined the applicability of the fourth exemption.

On the other hand, if the fourth exemption were improperly defined as protecting the confidentiality of commercial and financial information submitted to the government by private parties only where disclosure of the information is likely to cause substantial harm to the competitive position of the

[8] The 1974 amendments to the Freedom of Information Act require agencies to make initial disclosure decisions within 10 working days after receiving a request under the Act. 5 U.S.C. § 552(a)(6)(A)(i). A maximum of 10 additional working days is provided for such a decision under "unusual circumstances". 5 U.S.C. § 552(a)(6)(B).

submitter, the administrative agencies would be incapable in the vast majority of cases of finding the facts necessary to determine whether the information was within the exemption — particularly given the statutory time restraints for such a determination. Extensive and costly *de novo* review by a federal court on the issue of competitive harm would be required.

(2) The question whether the fourth exemption is "mandatory" or "permissive" also cannot properly be resolved without a preliminary determination of the nature of the interests Congress sought to protect by the fourth exemption and the degree of protection intended. Again, it is submitted that the fourth exemption was primarily intended by Congress to protect the interests of private parties in preserving the confidentiality of commercial and financial information submitted to the government which would not customarily be disclosed to the public by the private party. In so doing, Congress determined the "public interest" by striking a balance between the interest in governmental disclosure and the interest in preserving the confidentiality of private information submitted to the government. Congress could not at the same time have intended to confer upon the agencies of the federal government the broad discretion to upset that balance by disclosing information within the fourth exemption based upon their own *ad hoc* determinations of the "public interest". Moreover, even if this Court should find that Congress intended to confer upon the agencies the discretion to disclose information within the fourth exemption, the proper definition of the purpose and scope of the exemption is necessary to determine whether an agency decision to disclose exempt information constitutes an abuse of such discretion.

(3) Finally, in determining whether agency regulations which purport to authorize disclosure of information within the fourth exemption constitute "authorization by law" to disclose such information within the meaning of 18 U.S.C. § 1905,[9] it must be determined in the first instance whether such regulations have the force and effect of law. *Amicus* submits that the so-called "disclosure regulations" here at issue, 41 C.F.R. Part 60-40,[10] are so inconsistent with the intended purpose and scope of the fourth exemption that they cannot have the force and effect of law, and therefore cannot constitute "authorization by law" within the meaning of 18 U.S.C. § 1905.

Simply stated, the threshold issue in this case is the determination of the purpose and proper scope of the fourth exemption to the Freedom of Information Act. As a party to a similar case in which this threshold issue is expressly presented for review, *Amicus* has a vital interest that the issue be examined directly and fully by this Court rather than resolved indirectly by implication from the answers to the questions presented by petitioner.

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[9] Section 1905 prohibits any governmental official or employee from disclosing a broad range of private commercial and financial information obtained from private parties unless such disclosure is "authorized by law". *See* note 81, *infra*.

[10] *See* note 82, *infra*.

ARGUMENT

I

THE FOURTH EXEMPTION TO THE FREEDOM OF INFORMATION ACT WAS INTENDED BY CONGRESS TO PRESERVE THE CONFIDENTIALITY OF ALL INFORMATION OF A COMMERCIAL OR FINANCIAL NATURE SUBMITTED TO THE GOVERNMENT BY A PRIVATE PARTY WHICH WOULD CUSTOMARILY NOT BE RELEASED TO THE PUBLIC BY THE PERSON FROM WHOM IT WAS OBTAINED.

A. The Legislative History of the Fourth Exemption Evinces Congress' Intent to Protect the Traditional Privacy and Competitive Interests of Private Parties Who Submit Information to the Government.

The Freedom of Information Act, 5 U.S.C. § 552 (the "Act"), was enacted in response to the ineffectiveness of the initial section 3[11] of the Administrative Procedure Act ("APA").[12] Various bills were proposed in the 84th, 85th, 86th and 87th Congresses to amend and strengthen the public information section of the APA, but none was seriously acted upon.[13] On June 4, 1963, two bills were introduced in the Senate. The first bill, S. 1663, 88th Cong., 1st Sess. (1963), proposed to amend the entire APA, while the second bill, S. 1666, 88th Cong., 1st Sess.

[11] Act of June 11, 1946, ch. 324, Section 3, 60 Stat. 238.

[12] *See Discussion of the Legislative History of the Freedom of Information Act* ("Discussion of Legislative History") contained in Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 93d Cong., 2d Sess., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* 6-7 (Committee Print 1974) ("Source Book").

[13] *See* Discussion of Legislative History contained in Source Book at 7.

(1963), which was identical to section 3 of S. 1663, proposed to amend only section 3 of the APA.[14]

S. 1666 (section 3 of S. 1663) did not initially contain a separate subsection which provided for exemptions to the general disclosure requirements of the Act.[15] However, subsection (c) of S. 1666 did list three exceptions to the general obligation to disclose agency records, all of which were aimed at protecting *governmental* interests in confidentiality.[16]

In the course of the 1963 Senate hearings on S. 1666 ("1963 Senate Hearings"), strenuous objections were expressed regarding the potential impact of such a bill upon the interests of *private* submitters of information to the government. These objections reflect a concern for the protection of traditional privacy and competitive interests of private parties who submit information to the government.[17] G. d'Andelot Belin, General Counsel of the Treasury Department, for example, observed that ". . . one of the worst aspects of the present bill is that it would invade the traditional rights of privacy of the private citizen and require the Government to disclose the citizen's affairs to any business competitor, neighbor, prying relative, or criminal who seeks, for whatever reason, to gain access to such information." He concluded that "[w]e can see no reason for changing the

[14] The two bills were proposed simultaneously in order to focus attention on the need to make the revisions and to expedite the action in that regard. 109 Cong. Rec. 9958 (1963) (remarks of Senator Long).

[15] S. 1666 is reprinted in Freedom of Information: Hearings on S. 1666 and S. 1663 (in part) before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 88th Cong., 1st Sess. 1-2 (1964) ("1963 Senate Hearings").

[16] The three exceptions in subsection (c) of S. 1666 are similar to the first three exemptions of the current Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(3).

[17] As this Court has recently confirmed, the right of privacy is not enjoyed exclusively by individuals; most businesses

ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor."[18] Norbert A. Schlei, then Assistant Attorney General, Office of Legal Counsel, succinctly characterized the problem as follows:

> "A second problem area lies in the large body of the Government's information involving private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce. Much of this information is volunteered by employers, merchants, manufacturers, carriers, exporters, and other businessmen and professional people for purposes of market news services, labor and wage statistics, commercial reports, and other Government services which are considered useful to the cooperating reporters, the public and the agencies. Perhaps the greater part of such information is exacted, by statute,

(whether publicly held or privately owned) also have reasonable expectations of privacy based upon historical experience. *See Marshall v. Barlow's, Inc.*, 46 U.S.L.W. 4483, 4484-4485 (May 23, 1978).

[18] 1963 Senate Hearings at 173 and 174. *See also* 1963 Senate Hearings at 89 (Statement of Howard Bell, Vice President of the National Association of Broadcasters):

> "Privacy has historically been respected by the Government in financial matters which, for competitive purposes, should not be made publicly available.
>
> • • •
>
> We recognize the difficulties that arise when an attempt is made to balance the equities of access to information and invasion of personal privacy. However, we do feel that some provision must be made in the law to preclude any unwarranted invasion of personal privacy when information is required by administrative rule and is submitted in confidence. In our view, in such a case the equities are on the side of not requiring disclosure because the public value is nil, while the damage of such disclosure to a business enterprise could be substantial."

> in the course of necessary regulatory or other governmental functions.
>
> *Again, not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors.*" (Emphasis added.)[19]

Three additional exceptions were suggested in the 1963 Senate Hearings to deal with the lack of protection for business confidentiality. The first "would pertain to financial and other business matters which are 'submitted in confidence pursuant to statute or administrative rules or regulations, the disclosure of which would be a violation of personal privacy.'"[20] The second would simply include "trade secrets".[21] The third would adopt the framework of S. 1567, 87th Cong., 1st Sess. (1961), a bill passed over in the prior congressional term.[22] S. 1567 contained a specific "exceptions" section which included an exemption from disclosure for materials "submitted in confidence pursuant to statute or published rule."

Following the 1963 Senate Hearings, several revisions were made in S. 1666 and additional hearings were conducted on July 21 through 23, 1964.[23] As introduced at those hearings, subsection (c) of S. 1666 (section 3 of

[19] 1963 Senate Hearings at 199.

[20] 1963 Senate Hearings at 90 (Statement of Howard Bell).

[21] 1963 Senate Hearings at 91 and 169 (Statements of Bernard Fensterwald, Jr., Chief Counsel to the Senate Subcommittee on Administrative Practice and Procedure).

[22] 1963 Senate Hearings at 153-154 (Statement of Robert M. Benjamin, Chairman American Bar Association Special Committee on Code of Administrative Procedure).

[23] Administrative Procedure Act: Hearings on S. 1663 before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 88th Cong., 2d Sess. (1964) ("1964 Senate Hearings"). These hearings were on the entire S. 1663 which included S. 1666. *See* note 14 and accompanying text, *supra*.

S. 1663) was amended, in relevant part, to add a fourth exception for "trade secrets".[24] The failure of this exception to protect confidential business information other than trade secrets was criticized during the additional hearings.[25]

The full concern for the confidentiality of private business information expressed throughout the 1963 and 1964 Senate Hearings was recognized by the Senate Judiciary Committee in its Report No. 1219, "Clarifying and Protecting the Right of the Public to Information and for Other Purposes". S. Rept. No. 1219, 88th Cong., 2d Sess. (July 22, 1964).[26] Senate Report No. 1219 approved a modification of the fourth exception to include not only trade secrets but also "other information obtained from the public and customarily privileged or confidential." The amendment is explained in the Senate Report as follows:[27]

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[24] 1964 Senate Hearings at 3.

[25] *See e.g.*, Treasury Department Detailed Statement on S. 1663, As Revised, to Amend the APA, as reported in 1964 Senate Hearings at 177C, which states:

> "*Exemption (4)* in subsection (c) for 'trade secrets' is too limited to reach the confidential business information which the Department understands that the subcommittee staff agrees should be protected. The meaning of the term 'trade secrets' is not clear, particularly as it is used in statutes in conjunction with other types of business information, as in 18 U.S.C. 1905 and 15 U.S.C. 46, 78x, and 79v. The Department strongly recommends that exemption should be revised to exempt 'records, or parts thereof, which contain information obtained from the public which is customarily privileged or otherwise confidential.' This would cover private information submitted voluntarily or involuntarily and recognized by statute, regulation, or judicial decision as protected against unauthorized disclosure."

See also 1964 Senate Hearings at 248 (comments of Professor Kenneth Culp Davis on the failure of the proposed bill to protect confidential communications between agencies and private parties).

[26] *Reprinted in* Source Book at 86 *et seq*.

[27] *See* Source Book at 91.

> "This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, and other such privileges."

The changes recommended in Senate Report No. 1219 were adopted and S. 1666 was amended. The revised version of the bill was passed by the Senate on July 28, 1964.[28] No action was taken by the House of Representatives on the bill before adjournment.[29]

In the 89th Congress, on February 17, 1965, a modified form of S. 1666 was reintroduced into the Senate as S. 1160, 89th Cong., 1st Sess. (1965), and in the House of Representatives as H.R. 5012, 89th Cong., 1st Sess. (1965). In both S. 1160 and H.R. 5012, the fourth exemption had been modified by substituting the words "commercial or financial" for the word "other" and deleting the word "customarily". No explanation for these modi-

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[28] 110 Cong. Rec. 17086-17089 (1964).

On July 31, 1964, Senator Humphrey moved to reconsider S. 1666 for several reasons. As to the fourth exemption, as amended, he expressed his concern that the clause as written, which included the words "customarily privileged and confidential", would not protect the confidentiality of such items as wage data submitted to the Bureau of Labor Statistics. Senator Humphrey suggested that the fourth exemption be amended to read "(4) trade secrets and information obtained from the public in confidence or customarily privileged or confidential." Senator Long persuaded Senator Humphrey that his amendment was unnecessary, stressing the fact that the only information which should be considered confidential would be information which had *customarily* been considered confidential. 110 Cong. Rec. 17666-17668 (1964).

[29] *See* Discussion of Legislative History, Source Book at 8.

fications has been found in the legislative history.[30] The revised version exempted "trade secrets and commercial or financial information obtained from the public and privileged or confidential."

The comments in The House of Representatives Hearings on H.R. 5012 on March 30, 31 and April 1, 2 and 5, 1965,[31] do not specifically address the amendments to the language of the exemption.[32] Rather, they focus on the question whether the exemption, as amended, covered information which was submitted to the government in confidence and received by the government under a pledge of confidentiality.[33] Several witnesses advised the subcommittee members to clarify the meaning of the fourth exemption in the legislative history through the language of the Committee Report by interpreting the clause in a manner which would strengthen the protection of business information submitted to the government in confidence.[34]

In the Senate Hearings on S. 1160 on May 12, 13, 14 and 21, 1965,[35] the same criticisms were voiced regarding

[30] One commentator has interpreted the deletion of the word "customarily" from the language of the fourth exemption as demonstrating, not an intent to alter the accepted meaning of the word "confidential" which it modified, but rather an intent to preclude the use of the word "customarily" to imply a privilege or confidentiality created simply by *agency* custom. *See* U.S. Dept. of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 33 (1967) ("A. G. Memorandum"), *reprinted in* Source Book at 232.

[31] Federal Public Records Law (Part 1): Hearings on H.R. 5012 before a Subcommittee of the Committee on Government Operations, House of Representatives, 89th Cong., 1st Sess. (1965) ("1965 House Hearings").

[32] The only criticism directed to the language changes was made by William Feldesman in the "Reply from the National Labor Relations Board" which stated:

> "The phrase 'commercial or financial' unnecessarily limits this exception. The equivalent exception in S. 1666 (88th Cong. 2d sess.), as passed by the Senate (110 Congressional Record 17080 [sic]), contained more preferable language, i.e., 'trade secrets and other information obtained from the public and customarily privileged or confidential'." 1965 House Hearings at 256.

Indeed, some commentators labored under the misconception that the fourth exemption had not been amended at all. *See e.g.*, 1965 House Hearings at 41 (Statement of H. T. Herrick, General Counsel, Federal Mediation and Conciliation Service).

[33] *See e.g.*, 1965 House Hearings at 55 (Statement of Fred Burton Smith, Acting General Counsel, Treasury Department): "Exemption (4) is a most necessary one, this is the trade secrets one, but it is not clear whether it is broad enough to include both information submitted to the Government under a pledge of confidentiality and information which is tendered to the Govenment in confidence." *See also* 1965 House Hearings at 185 (Statement of Andrew J. Biemiller, Director, Department of Legislation, AFL-CIO); 219-220 (Reply From Department of Defense); 229 (Reply From Department of The Treasury); 241 (Reply from Federal Communications Commission).

[34] *See e.g.*, 1965 House Hearings at 205, wherein Joseph Campbell in the "Reply from the General Accounting Office" states that:

> "In addition to the reasons stated above for the exclusion of information furnished by informants or otherwise submitted in confidence, it is evident that if such information and its sources are divulged to the public, information from such sources would no longer be available to the Government. Accordingly, we recommend that an additional exception be added to subsection (c) to the effect that disclosure is not required as to information submitted in confidence pursuant to statute or published rule or regulation or it be made clear in the legislative history that such information is of a privileged or confidential nature' as that term is used in subsection (c)(4). It should also be made clear that subsections (c)(3) or (c)(4) include any information the disclosure of which would be a violation of 18 U.S.C. 1905."

See also 1965 House Hearings at 187 (Statement of Kermit Overby, Director, Legislation and Research Department, Rural Electric Cooperative Association); 193 (Statement of Vincent T. Wasilewski, President, National Association of Broadcasters).

[35] Administrative Procedure Act: Hearings on S. 1160 and S. 1336 before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 89th Cong., 1st Sess., (1965) ("1965 Senate Hearings"), As in the case of Senate bills S. 1666 and 1663, S. 1160 was aimed at amending only section 3 of the APA while S. 1336, which contained the language of S. 1160, sought to amend the entire APA. 1965 Senate Hearings at 6-7 and 9-10.

the failure of the fourth exemption, as amended, to clarify the issue of the protection afforded information submitted to the government in confidence.[36] Further, there were additional statements regarding the need for protection of information submitted in applications for federal loans.[37]

The reports subsequently issued by the Senate and the House on S. 1160 do not directly comment on the modification of the language of the fourth exemption from the language in S. 1666 passed by the Senate the prior year. Instead, in the Senate report issued on S. 1160, S. Rept. No. 813, 89th Cong., 1st Sess., (October 4, 1965),[38] the "detailed description" of the fourth exemption is taken substantially verbatim from the comment in Senate Report No. 1219 on S. 1666.[39] Thus, Senate Report No. 813 states that the exemption "is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries *but which would customarily not be released to the public by the person from whom it was obtained.*" (Emphasis added.)[40] Senate Report No. 813 also contains a reference to data provided to lending agencies by borrowers,

[36] *See e.g.*, 1965 Senate Hearings at 292 and 295 (Statement of Philip A. Loomis, Jr., General Counsel, Securities and Exchange Commission); 383 (Analysis of S. 1336 by the U.S. Department of Agriculture); 436 (Department of Labor's Comments on S. 1336).

[37] *See e.g.*, 1965 Senate Hearings at 356 (Statement of National Rural Electric Cooperative Association on S. 1336); 406 (General Counsel of the Department of Commerce).

[38] *Reprinted in* Source Book at 36 *et seq*.

[39] The only major change in the comment was the additional recognition of privileged information between a borrower and a lending agency. *Compare* S. Rept. No. 1219, *reprinted in* Source Book at 91, *with* S. Rept. No. 813, *reprinted in* Source Book at 44.

[40] *Reprinted in* Source Book at 44.

reflecting concerns expressed in the 1965 Senate Hearings on this point.[41]

The House Report on S. 1160, H. Rept. No. 1497, 89th Cong., 2d Sess., (May 9, 1966)[42] similarly states that the exemption "would assure the confidentality of information obtained by the Government through questionnaires or through material submitted . . . [and] . . . [i]t exempts such material *if it would not customarily be made public by the person from whom it was obtained by the Government.*" (Emphasis added.)[43] As urged by the various witnesses in the 1965 House Hearings, the House Report goes on to state that the exemption "would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations."[44]

The Senate passed S. 1160, as amended, on October 13, 1965.[45] The House of Representatives passed the bill on June 20, 1966.[46]

Although the legislative history of the fourth exemption is not free of ambiguity, it is clear from the foregoing survey of the congressional hearings and reports that the exemption was enacted by Congress in response to expressions of concern for the protection of the privacy and competitive interests of private submitters.

[41] *See* S. Rept. No. 813, 89th Cong., 1st Sess. 9 (1965) wherein it is stated: "Specifically it [the fourth exemption] would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan."

[42] *Reprinted in* Source Book at 22 *et seq*.

[43] *Reprinted in* Source Book at 31.

[44] *Id*.

[45] 111 Cong. Rec. 26821 (1965).

[46] 112 Cong. Rec. 13661 (1966).

The prevailing congressional expression of the purpose and scope of the fourth exemption is that set forth in both Senate Report No. 813 and House Report No. 1497 indicating that Congress intended to protect those privacy and competitive interests by preserving the confidentiality of all information customarily not disclosed to the public by the submitter. Nothing in the language of the exemption[47] or in the legislative history supports a more restrictive view of the protective purpose and scope of the exemption.[48]

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[47] "Confidential" is defined in *Webster's Third New International Dictionary* 476 (unabridged ed. 1966) as follows: "1: communicated, conveyed, acted on, or practiced in confidence: known only to a limited few: *not publicly disseminated* . . . ." (Emphasis added.)

[48] While it has been argued that the Senate and House Reports are inconsistent with the language of the fourth exemption, *see* K. C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 789-790 (1967) ("Davis, Preliminary Analysis"), the basis for that criticism has not focused on the definition of the word "confidential" but rather on the reports' interpretation of the coverage of the exemption to include non-commercial and non-financial information. *E.g.*, both reports would seemingly extend the scope of the fourth exemption to such information as doctor-patient correspondence. However, Professor Davis agrees that the scope of the fourth exemption protection for confidential commercial or financial information is not limited to merely that information which will have a competitive effect if disclosed. K. C. Davis, *Administrative Law of the Seventies*, § 3A.19 at 91 (1976). Moreover, on the "confidentiality" issue, the reports reflect the specific comments and discussions on the hearings on the respective bills. *See* notes 39 and 41 and accompanying text, *supra; see also* language in House Report No. 1497 regarding "material submitted and disclosures made in procedures such as the mediation of labor-management controversies" paraphrases the statements made by H. T. Herrick, General Counsel for the Federal Mediation and Conciliation Service. 1965 House Hearings at 44-46. Likewise, the comments on "information which is given to an agency in confidence" refers to the statements made by Fred Burton Smith, Acting General Counsel to the Treasury Department. 1965 House Hearings at 55.

B. The Decision in National Parks I, While Purporting to Refine Prior Judicial Interpretations of the Fourth Exemption, Fashioned a Test for Determining Its Applicability Which Is Unsupported by the Legislative History and Inconsistent with the Intended Purpose of the Exemption.

In construing and applying the language of the fourth exemption, the courts have required a showing of each of the three distinct elements delineated in that exemption. In order to fit within the exemption, information (other than a trade secret) must be (1) commercial or financial in nature, (2) obtained from a person and (3) privileged or confidential. *See e.g., Brockway v. Department of Air Force,* 518 F.2d 1184, 1188 (8th Cir. 1975); *Getman v. N.L.R.B.*, 450 F.2d 670, 673 (D.C. Cir. 1971); *Consumers Union of U.S., Inc. v. Veterans Administration,* 301 F. Supp. 796, 802-803 (S.D.N.Y. 1969), *appeal dismissed as moot,* 436 F.2d 1363 (2nd Cir. 1971). As in the instant case, the first two elements are generally easy to ascertain and not disputed.[49] The dispute over the purpose and scope of the fourth exemption in the case law, therefore, has generally focused upon the construction of the term "confidential". *See generally* Project, *Governmental Information and the Rights of Citizens,* 73 Mich. L. Rev. 971, 1065-1067 (1975) ("Project").

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[49] A controversy had arisen among some commentators as to whether the fourth exemption covered non-commercial or non-financial information. *Compare* A.G. Memorandum 32-34, *reprinted in* Source Book at 231-233, *with* Davis, Preliminary Analysis, 34 U. Chi. L. Rev. at 787-792. However, that controversy did not center upon the meaning of "commercial or financial information". *See* note 48, *supra.*

As to the second requisite, *i.e.*, that the information be "obtained from a person", the only problem area has been whether information obtained from governmental or personnel sources can be considered as having been "obtained from a person". *See* K. C. Davis, *Administrative Law Treatise, 1970 Supplement* § 3A.19 at 152-153 (1971).

Prior to the District of Columbia Circuit decision in *National Parks & Conservation Ass'n. v. Morton,* 498 F.2d 765 (D.C. Cir. 1974) (*"National Parks I"*), the most frequently articulated standard for construing the term "confidential" was that set forth in Senate Report No. 813: *i.e.,* information "which would customarily not be released to the public by the person from whom it was obtained." *See e.g., Sterling Drug Inc. v. F.T.C.,* 450 F.2d 698, 709 (D.C. Cir. 1971); *see also* Note, *The Freedom of Information Act: A Seven-Year Assessment,* 74 Colum. L. Rev. 895, 950-951 (1974) ("Note"). In adopting this test, such courts rejected the broader subjective interpretation of the exemption, supported by House Report No. 1497, that all information obtained from a private party who wishes the information be kept confidential would be considered "confidential" within the meaning of the exemption. *See e.g., Bristol-Myers Company v. F.T.C.,* 424 F.2d 935, 938-939 (D.C. Cir.), *cert. denied,* 400 U.S. 824 (1970).[50] Thus, most courts adopting the "not customarily disclosed" standard determined that the standard was objective rather than subjective. *See*

[50] Only one reported case has applied the broader subjective interpretation of the fourth exemption suggested in H. Rept. 1497, 89th Cong., 2nd Sess. 9 (1966). *Barceloneta Shoe Corp. v. Compton,* 271 F. Supp. 591, 594 (D. Puerto Rico 1967). The Ninth Circuit Court of Appeals, however, expressed its approval of the broader subjective test in *G.S.A. v. Benson,* 415 F.2d 878, 881 (9th Cir. 1969):

> "The district court concluded, however, 'that this exemption clearly condones withholding information only when it is obtained from a person outside the agency, and that person wishes the information to be kept confidential.' 289 F.Supp. at 594; and see citations therein. The district court further stated that 'the exemption is meant to protect *information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential.' Id. This conclusion as to the meaning of 'confidentiality' seems correct.* See S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)." (Emphasis added.)

e.g., Bristol-Myers Company v. F.T.C., supra, 424 F.2d at 938-939; *M. A. Schapiro & Co. v. S.E.C.,* 339 F. Supp. 467, 470-471 (D.D.C. 1972); *see also* Note, 74 Colum. L. Rev. at 951.

National Parks I was not a "reverse FOIA" case.[51] It involved a request by the National Parks and Conservation Association for documents from the National Park Service relating to concession arrangements with private concessioners. The request was denied by the government as to financial information submitted by the concessioners, and the Association sued to compel disclosure under the Act. The district court held that the financial information was "confidential" within the meaning of the fourth exemption, and therefore exempt from disclosure because it was of a kind "that would not generally be made available for public perusal." *National Parks & Conservation Ass'n v. Morton,* 351 F. Supp. 404, 407 (D.D.C. 1972).

The District of Columbia Court of Appeals in *National Parks I* began its analysis by recognizing that prior decisions in that Circuit had adopted the "not customarily disclosed" standard enunciated in Senate Report No. 813, and had determined that standard to be an objective one. *National Parks I, supra,* 498 F.2d at 766. Not satisfied that this standard was "justified by the legislative history" (despite its derivation from both the Senate and House Reports on the enacted bill), the court surveyed the legislative history and found that the exemption had a two-fold justification: "(1) encouraging cooperation by

[51] Litigation arising pursuant to the Freedom of Information Act has been in two forms. The usual case, expressly provided for in the Act, involves a party suing a government agency to obtain disclosure of requested information. The so-called "reverse FOIA" case, as the instant case, involves a party who has submitted the information to the government and subsequently sues the government to enjoin the disclosure of that information to a third party requester.

those who are not obliged to provide information to the government and (2) protecting the rights of those who must". *Id.* at 769. The court concluded that the "history firmly supports the inference that section 552(b)(4) is intended for the benefit of persons who supply information as well as the agencies who gather it"; and purporting to summarize its findings, the court fashioned the following test:

> "[C]ommercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) *to cause substantial harm to the competitive position of the person from whom the information was obtained.*" (Emphasis added and footnote omitted.) *Id.* at 770.

The second element of this test, however, is a *non sequitur*. Although the possibility of competitive harm from disclosure was raised in the congressional hearings cited in the opinion, there is no support for the conclusion that competitive position was the *only* private business interest which the exemption was intended to protect.[52] On the contrary, the history cited also indi-

[52] As noted by Professor Kenneth Culp Davis in *Administrative Law of the Seventies*, § 3A.19, 91 (1976):

> "The definition [of confidential] based on competition seems obviously too narrow, because adequate reasons for confidentiality may have no relation to competition . . .".

The court in *National Parks I* utilized primarily the 1963 Senate Hearings on an initial version of the FOIA bill for support of its proposition that competitive harm resulting from disclosure was the primary reason for the fourth exemption. 498 F.2d at 768-769 ns. 5-10 and accompanying text. While those hearings do support the argument that competitive harm was one concern, they also support the broader concern for the preservation of traditional privacy rights with respect to private business information submitted to the government. *See* footnotes 17-22 and accompanying text, *supra*. The language of the fourth exemption created after the 1963 and 1964 Senate Hearings (*i.e.*, "trade secrets and other information customarily privileged and confidential") does not support the conclusion that preventing competitive harm was the dominant purpose behind the enactment of the fourth exemption.

cates the congressional intent to preserve the traditional *privacy* interests of business enterprises — whether or not competitive injury might result from disclosure.[53] The addition of the requirements of the *probability* and *substantiality* of the competitive harm resulting from disclosure is pure judicial legislation; not a shred of support for such a restrictive construction can be found in the language of the exemption, in its legislative history or, indeed, in the court's opinion.

The court of appeals in *National Parks I* remanded the the case to the district court for further proceedings on the competitive injury issue. 498 F.2d at 771.[54] After two days of full evidentiary hearings, the district court found that the government (with the assistance of the concessioners as intervenors) satisfied the burden of establishing that disclosure of most of the information at issue would be likely to cause the concessioners substantial competitive harm.[55]

The Association again appealed to the District of Columbia Circuit. In *National Parks & Conservation Ass'n. v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*"National Parks II"*), the court reviewed the district court's appli-

[53] *See* Section I-A of this brief, *supra*. *Accord*, Patten and Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 Ad. L. Rev. 193, 197 (1977) (Patten & Weinstein); Project, 73 Mich. L. Rev. 1068.

[54] The Association objected to the need for such a remand, arguing that no showing of competitive injury was possible because the concessioners were statutory monopolists with no competition in their business operations or in the renewal of their contracts. Although the court found this argument "very compelling", it remanded the case to provide an opportunity for the agency to develop a fuller record on this issue. *National Parks I, supra*, 498 F.2d at 770.

[55] *See National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 675 (D.C. Cir. 1976).

cation of the "competitive harm" test created in *National Parks I* and recognized the serious problems of proof engendered by that test. Rather than reconsidering the validity of the test, however, the court lowered the level of proof required to demonstrate competitive harm. *Id.* at 679-81. Specifically, the court held that the complex kinds of evidence on competitive harm associated with antitrust proceedings were not required to establish the applicability of the fourth exemption,[56] although it conceded that "[s]uch evidence would be relevant and material under the second prong of the *National Parks I* test." *Id.* at 680. The court observed that it was not "convinced of the feasibility and wisdom of imposing such a requirement in fourth exemption cases generally", *id.* at 681, noting that "the costs of obtaining such detailed economic evidence as appellant suggests should have been required of these concessioners *might well preclude a small business from ever seeking to prevent disclosure of its confidential commercial or financial information.*" (Emphasis added.) *Id.* at 681 n. 24.

The decision in *National Parks II* does little to lighten the burden created by the competitive harm test. In most circumstances, proof of the likelihood of competitive harm occasioned by disclosure of particular information will necessitate complex and detailed evidence even to establish the nature of the competitive milieu in which the submitter does business.[57] Thus, the conclusion of the court in *National Parks II* that the costs of obtaining detailed economic evidence might preclude a

[56] Examples suggested by the Association included, *inter alia*, surveys of concessioner's customers, demonstrating the cross-elasticity of demand between goods and services provided by concessioners and non-concessioners, marketing practice surveys, etc. *National Parks II, supra*, 547 F.2d at 679-680.

[57] It suffices here to state that most private submitters of information to the government (including *Amicus*) operate in a competitive environment which is poles apart from the quasi-monopoly position of the concessioners in *National Parks*.

private submitter from seeking to protect its interests under the fourth exemption is not avoided by lowering the degree of the required proof — particularly where the government chooses *not* to assert the fourth exemption or asserts the purported authority to disclose information notwithstanding its applicability.[58]

C. The "Competitive Harm" Test Fashioned by the Court in National Parks I Effectively Vitiates the Protective Purpose of the Fourth Exemption Without Promoting the Primary Disclosure Purpose of the Freedom of Information Act.

The principal purpose of the Freedom of Information Act is to provide public access to governmental, not private, information. *Westinghouse Electric Corp. v. Schlesinger, supra,* 542 F.2d at 1210 n. 64; *cf. N.L.R.B. v. Sears,* 421 U.S. 132, 143 n. 10 (1975) ("The Act is fundamentally designed to inform the public about agency

[58] It has been argued that the court in *National Parks II* lowered the test to the extent that competitive harm need not be proven at all but merely suggested. *See* Patten & Weinstein, 29 Ad. L. Rev. at 200-201. Indeed, the language of the opinion itself states that:

> "No actual adverse effect on competition need be shown, nor could it be, for the requested documents have not been released. The court need only exercise its judgment in view of the nature of the material sought and the competitive circumstances in which the concessioners do business, relying at least in part on relevant and credible opinion testimony." *National Parks II, supra,* 457 F.2d at 683.

However, the court has not really defined what level of evidence would be *sufficient* (though it suggests that expert testimony will be necessary). Given the difficulty of establishing even the "competitive circumstances" of the submitter, *National Parks II* does little to remedy the problem of proof created in *National Parks I*. For application of the test subsequent to *National Parks II, see Sears, Roebuck & Co. v. G.S.A.,* 553 F.2d 1378 (D.C. Cir.) *cert. denied,* 98 S. Ct. 74 (1977) (holding that summary judgment on the competitive harm issue was improper).

action and not to benefit private litigants.")[59] That purpose is directly served by narrowly construing those exemptions which are intended to protect *governmental* interests in non-disclosure; it is served only indirectly, and to a far lesser extent, by narrow construction of exemptions designed to protect the interests of *private* parties in nondisclosure.[60]

Moreover, the Act was expressly designed to preclude an assessment of the requester's need for the information, thereby precluding a balancing of that need against the interest of the party seeking to preserve the confidentiality of the information. Davis, Preliminary Analysis, 34 U. Chi. L. Rev. at 765-766.[61] This again is a disclosure-oriented approach designed to encourage the prompt release of governmental information to the public. When applied to private information, however, the

[59] The language of the Act itself reflects its primary purpose to expose agency operations to the public. The basic disclosure requirements of the Act are specifically and predominantly designed to inform the public about *agency* organization, rules of procedure, policies, rulings, opinions, orders, decisions, staff manuals, staff instructions, etc. 5 U.S.C. § 552(a)(1) and (a)(2). Section 552(a)(3) provides generally for disclosure of other "records" upon request. Although private information submitted to the government apparently falls within this latter category of agency "records", disclosure of such information is incidental to the primary thrust of the Act.

[60] As stated by one commentator, "[c]ourts have been slow to recognize that the public's interest in confining the breadth of the exemptions is not equally strong for all nine provisions." Note, *In Camera Inspections Under the Freedom of Information Act*, 41 U. Chi. L. Rev. 557, 564 n. 52 (1974).

> "[C]ertain exemptions protect information the revelation of which would not offer insights into the workings and policies of the agency. For example, applicants sometimes request information about particular third parties. Denials of such requests are inherently less likely to be tainted by motives of concealing the agency's own errors, and disclosure of the information is unlikely to provide data germane to the policies of the Act." *Id.* at 565-567.

[61] As Professor Davis observes, this provision is a "departure from the customary practices of normal people, who often disclose to those having a special reason for knowing and

inability to balance interests creates special problems: *i.e.*, the privacy and competitive interests of private business which the fourth exemption was intended to protect are, by their nature, especially vulnerable to the Act's failure to distinguish between the competitor, the intermeddler and the person with a legitimate need to know. Narrow construction of the fourth exemption therefore poses a peculiar threat to the specific interests protected by that exemption.[62]

Finally, this Court has recognized that the Act's exemptions "are plainly intended to set up *concrete, workable standards*" for determining whether particular information is exempt from disclosure. *E.P.A. v. Mink*, 410 U.S. 73, 79 (1973) (Emphasis added.) The competitive harm test of *National Parks I* is simply not a workable standard — particularly in view of the timing of agency responses to requests for information required under the Act, as amended.[63] If information from a private submitter is requested, no formal mechanism exists for the submitter to assert its interests under the fourth exemption; the Act does not even require *notice* to the submit-

> withhold from those who do not.... But under the Act, Uncle Sam's information is either made public or not made public. The Act never requires it to be protected from all except those who have a special need for it." Davis, Preliminary Analysis, 34 U. Chi. L. Rev. at 765.

[62] The increasing use (or abuse) of the Freedom of Information Act by private parties seeking inexpensive insights into the operations of their competitors or discovery for civil litigation underscores this dilemma. *See e.g.*, Shorr, *Telling Tales: How Law Is Being Used to Pry Business Secrets From Uncle Sam's Files*, Wall Street Journal, May 9, 1977, at 1; Lardner, *Use, Abuse of Freedom of Information Act*, Washington Post, July 27, 1976, at A 4.

[63] Initial agency decisions to disclose or withhold information must be made within 10 working days after receipt of a request under the Act. 5 U.S.C. § 552(a)(6)(A)(i) (1977). *See note* 8, *supra*. For a discussion of agency problems in meeting the time deadlines set forth in the Act in other contexts, *see Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976); *Exner v. F.B.I.*, 542 F.2d 1121 (9th Cir. 1976).

ter when its commercial data has been requested.[64] Moreover, governmental agencies charged with processing requests for disclosure under the Act are, in the vast majority of cases, incapable of assessing the likelihood or degree of competitive harm to the submitter within the tight time frame allotted by the Act, and have little incentive to make the assessment.[65] Even assuming that the submitter were notified, it is difficult and expensive for the submitter to present the evidence necessary to make a showing of competitive harm. As a result, the only courses available to the private submitter are to undertake the enormous cost of litigation in federal court to restrain disclosure or to forego the protection intended by the Act.

Considering the Act as a whole, the restrictive competitive harm test of *National Parks I* effectively vitiates the fourth exemption's intended protection of private interests, and does so without materially enhancing the Act's primary purpose to promote disclosure of information on government operations. The test therefore

[64] The Attorney General recommended that, in certain circumstances, agencies should consult with submitters before determining whether requested information is within the fourth exemption, A. G. Memorandum at 34, and some agencies have promulgated regulations requiring notice to submitters prior to release of their information. *E.g.*, 43 C.F.R. § 2.13(h) (1977). Such notice is not, however, required by the Act.

[65] As recognized by the court in *Westinghouse Electric Corp., supra*, 542 F.2d at 1213:

> "... [T]here is always the real risk that the agency itself will be delinquent in asserting the rights of the private party. After all, it could not care less about protecting the competitive position of a supplier of information. That is no part of its responsibility. Neither does it have, as has already been observed, in most instances, sufficient knowledge to assert properly the private party's right to confidentiality. And it must not be forgotten that the protection of a competitive position is both a valuable and often complex matter, dependent upon full proof, and one 'basic to our free enterprise system'" (Footnote omitted.)

See also note 69 and accompanying text, *infra;* Patten & Weinstein, 20 Ad. L. Rev. at 203-204.

not only conflicts with the language and legislative history of the fourth exemption, it also effectively destroys the Act's intended accommodation of the public interest in disclosure of governmental information and the private interests in non-disclosure of confidential business information.

II

IF THE FOURTH EXEMPTION WERE PROPERLY INTERPRETED TO GIVE EFFECT TO ITS INTENDED PURPOSE AND SCOPE, EXTENSIVE DE NOVO JUDICIAL REVIEW OF AGENCY DETERMINATIONS TO DISCLOSE PRIVATE INFORMATION MAY NOT BE NECESSARY.

The impact of a proper determination of the purpose and scope of the fourth exemption upon the resolution of questions presented by petitioner in this case is most dramatic with respect to the question of the scope of judicial review. Even if judicial review of an agency decision to disclose private information were limited to the scope of review afforded by the APA,[66] Section 706 of the APA, 5 U.S.C. § 706, contemplates *de novo* review of agency action when the agency's fact-finding procedures in an adjudicatory action are inadequate. *Citizens*

[66] *Amicus* does not concede that the scope of review in such actions is limited by the APA. The submitter has a right to *de novo* review based upon implied causes of action to protect its rights under the Freedom of Information Act and 18 U.S.C. § 1905. *E.g., Westinghouse Electric Corp. v. Schlesinger, supra,* 542 F.2d at 1211; *Hughes Aircraft Company v. Schlesinger,* 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending,* No. 75-1064 (9th Cir.). The argument in the text is limited to discussion of judicial review under the APA, however, to demonstrate that extensive *de novo* review will be necessary – even under the APA standards – so long as the scope of the fourth exemption is improperly construed. Of course, the extent, complexity and cost of judicial resolution of a submitter's rights under the Freedom of Information Act and section 1905 also hinge on the determination of the scope of the fourth exemption.

to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971); *see also* 1 K. C. Davis, *Administrative Law Treatise*, § 7.02 at 412-415 (1958). If the fourth exemption were improperly construed to require a determination of the likelihood or degree of competitive harm occasioned by disclosure, the agency procedures for making such a determination under the Act are woefully inadequate.[67]

As previously indicated, the Act does not require notice to the private submitter of information that a request has been made, and the statutory time restraints preclude a rational assessment of the "competitive harm" issue.[68] Compounding these fundamental procedural deficiencies, the complexity of the factual determination of competitive harm is simply beyond the capacity of agency personnel charged with making disclosure decisions under the Act. The government itself, in its petition for the rehearing *en banc* of *National Parks I*, conceded its incapacity to make proper findings on the issue of competitive harm:

> ". . . [T]he government receives information of almost infinite variety from a multitude of firms and individuals engaged in business ventures of all types.

[67] Facts relating to the issue of competitive harm occasioned by disclosure are clearly "adjudicative facts" requiring an adjudicatory hearing. As stated by Professor Davis:

> "Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial. The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rubut or explain evidence that bears upon adjudicative facts." 1 K. C. Davis, *Administrative Law Treatise*, § 7.02 at 413 (1958).

[68] *See* notes 63-65, *supra*. The time restraints of the Act obviously preclude an evidentiary hearing on the competitive harm issue.

> *To require the government to demonstrate in each case that the particular information at issue, because of the peculiarities of a particular industry or profession, will in fact result in substantial competitive harm, is to impose an overwhelming, if not impossible burden. In view of the fact that the government is not likely to be intimately familiar with a particular business or occupation, there is a high risk that the government will fail to demonstrate that competitive harm is likely to result from disclosure in many cases, when, in fact, competitive harm would indeed result from disclosure.* To force the government to bear the burden of proving that disclosure will result in substantial competitive harm, is thus manifestly unfair to the many businesses and individuals who submit trade secrets, and commercial and financial information to the government in confidence." (Emphasis added.)[69]

If, on the other hand, the fourth exemption were properly construed as protecting all commercial information "which would customarily not be disclosed to the public" by the submitter, the procedures of the Act and the fact-finding capabilities of the agencies might be adequate to determine the applicability of the exemption. The objective test of "customarily not disclosed to the public" could be met, for example, by affidavit of the

[69] *National Parks & Conservation Association v. Morton*, D.C. Cir. No. 73-1033, Appellees' Petition for Rehearing and Suggestion of Rehearing *En Banc* at 6-7 (1974). *See also e.g.*, S.E.C. Release No. 33-5571, 40 Fed. Reg. 8797, 8799 (March 3, 1975):

> "The [Securities and Exchange] Commission regrets that in many cases the Commission will disclose records although persons who cooperated in its investigation would have reasonable grounds to object, either because of personal privacy or business secrecy considerations. But the stringent time requirements under the Freedom of Information Act, as amended, as well as the heavy financial and manpower burden that the Commission would be obliged to sustain if it were to attempt to examine each individual record for these purposes, will generally prevent the Commission from refusing to make disclosure on these bases."

submitter explaining the internal procedures adopted to limit dissemination of the information. Agencies themselves, in many cases, would have access to information regarding the confidential treatment of similar information by other submitters which itself would establish, objectively, that the information was not of a type customarily disclosed to the public. Under such circumstances, a private submitter challenging an agency determination to disclose information would not necessarily be entitled to *de novo* review under the APA.

In view of the obvious impact of a determination of the scope of the fourth exemption upon the question of *de novo* review under the APA, it is somewhat surprising that the courts and commentators have determined the latter question without considering the former.[70] One commentator, for example, (1) apparently assumed the propriety of the competitive harm test fashioned by the court in *National Parks I*,[71] (2) concluded that *de novo* review in actions brought by submitters was not required under the APA because, *inter alia*, submitters have not shown the inadequacy of FOIA fact-finding procedures;[72] and (3) at the same time observed that new legislation was necessary to provide procedures for a meaningful determination of the facts by the agency.[73] The apparent inconsistency of these positions can be reconciled by discarding the competitive harm test of *National Parks I* and returning to the definition of the fourth exemption established by Congress.

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[70] *See* note 79, *infra*.

[71] Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Act Lawsuit*, 55 Tex. L. Rev. 587, 594 n. 24 (1977).

[72] *Id.* at 629.

[73] *Id.* at 634-638. The suggested legislation includes provision for notice to the submitter, time for the submitter to present arguments, and opportunity to submit evidence at informal agency hearings.

III

IN LIGHT OF THE PURPOSE OF THE FOURTH EXEMPTION TO PROTECT PRIVATE (AS OPPOSED TO GOVERNMENTAL) INTERESTS, THE GOVERNMENT MAY NOT DISCLOSE INFORMATION WHICH FALLS WITHIN THAT EXEMPTION.

Congress enacted the fourth exemption to preserve the traditional privacy and competitive interests of private parties who submit information to the government; and, in so doing, determined that such private interests outweigh the general public interest in disclosure of information within that exemption.[74] The balance represented by the fourth exemption therefore constitutes the Congressional determination of the public interest.[75] Congress could not at the same time have intended to confer broad discretion upon government agencies to disclose information within the exemption based upon their own *ad hoc* determinations of the "public interest".

Authorities which support agency discretion to disclose information within the Act's exemptions generally overlook the fundamental difference between those exemptions designed to protect *governmental* interests in nondisclosure and those designed to protect *private* interests. *See e.g., Pennzoil Co. v. F.P.C.*, 534 F.2d 627 (5th Cir. 1976); *Charles River Park "A", Inc. v. H.U.D.*, 519 F.2d

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[74] *See* Section I-A of this brief, *supra*.

[75] *See* Project, 73 Mich. L. Rev. at 1045-1046.

As stated in H. Rept. No. 1497, 89th Cong., 2d Sess. 6 (1966): "It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. This bill strikes a balance considering all these interests."

935 (D.C. Cir. 1975).[76] Authorities which have denied agency discretion to disclose information within the fourth exemption have focused upon the nature of the interests Congress sought to protect by enacting that exemption. *Westinghouse Electric Corp. v. Schlesinger, supra,* 542 F.2d at 1197-1205; *Continental Oil Co. v. F.P.C.,* 519 F.2d 31, 35-36 (5th Cir. 1975), *cert. denied sub nom., Superior Oil Co. v. F.P.C.,* 425 U.S. 971 (1976); *but*

[76] The court of appeals in this case also held that the fourth exemption was permissive, despite its recognition "that disclosure of submitter information is qualitatively different from disclosure of data directly relating to government operations and that the interest in privacy appears stronger with respect to the former than the latter." *Chrysler Corporation v. Schlesinger, supra,* 565 F.2d at 1184. The Eighth Circuit followed the *Chrysler* decision on this issue without significant discussion. *General Dynamics Corp. v. Marshall,* 16 E.P.D. ¶8128 at 4594-4595 (8th Cir. 1978).

There is little in the legislative history *of the Act* which suggests the permissive nature of the exemptions, and the references which support such an interpretation refer generally to all exemptions. *See e.g.,* H. Rept. No. 1497, *supra* at 2, 6 (using the words "*may* be exempt" (emphasis added) and "permit nondisclosure"). Indeed, with respect to the fourth exemption, the legislative history supports the mandatory nature of the exemption. *See e.g.,* H. Rept. No. 1497, *supra,* at 10 ("This exemption would *assure* the confidentiality of information obtained by the Government. . . ." [Emphasis added.])

A 1972 House report reviewing compliance with the Act also contains references to the permissive nature of the exemptions generally without focusing upon the nature of the interests protected by the different exemptions. H. Rept. No. 92-1419, 92d Cong., 2d Sess. 7 (1972).

The references to the permissive nature of the exemptions in the legislative history of the 1974 amendments to the Act should be understood in the light of the specific exemptions then being scrutinized by Congress. The most controversial was the first exemption relating to information classified by the Executive as secret in the interest of national defense or foreign policy, and most comments regarding the permissive nature of the exemptions were made in the context of amending that exemption. *See e.g.,* S. Rept. No. 93-854, 93d Cong., 2d Sess. 6 (1974). Similarly, the language of this Court in *E.P.A. v. Mink,* 410 U.S. 73 (1973) suggesting that the exemptions to the Act are permissive should be read in the context of the particular exemption at issue in that case: *i.e.,* the first exemption which clearly protects governmental, not private interests.

see Pennzoil Co. v. F.P.C., supra, 534 F.2d at 632.[77] *Amicus* submits that although Congress may well have conferred discretion upon government agencies to waive their own rights in the interest of disclosure, Congress did not intend to permit such agencies to waive the rights of private submitters.

Moreover, if this Court should determine that the fourth exemption is permissive, the determination of the scope of the exemption will have an enormous impact upon the agencies' exercise of such discretion. If agencies are confronted with the impossible task of determining the applicability of the fourth exemption (which is necessary to determine whether they *must* disclose under the Act),[78] they are very likely to take the path of least resistance and release the information pursuant to their purported discretionary power to determine the public interest.[79]

[77] The Ninth Circuit Court of Appeals, upon consideration of the specific interests protected by the fourth exemption, found that the exemption was mandatory in *Union Oil Co. of California v. F.P.C.,* 542 F.2d 1036, 1044-1045 (9th Cir. 1976), stating:

> "While the literal language of § 552 lends itself to . . . [the interpretation that the fourth exemption is permissive], the Congressional purpose in enacting the exemption was 'to protect from disclosure certain information which is highly valuable to several important industries and which should be kept confidential when it is contained in government records.' Sen.Rep.No.248, 90th Cong., 1st Sess., p. 2 (1967).
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> If businesses are entitled to such protection under the statute as a matter of right, that right must be upheld even in cases where the agency fails to assert it on behalf of the private suppliers of data."

On petition for rehearing, however, the Ninth Circuit withdrew the portion of its opinion on this issue as premature without expressing a view as to its validity. *Id.* at 1045.

[78] *See* note 69 and accompanying text, *supra.*

[79] The government's tendency to rely upon its purported discretionary power rather than confronting the competitive harm issue is demonstrated by the government's approach to litigating these "reverse FOIA" suits. In the case brought by *Amicus, Hughes Aircraft Co. v. Schlesinger,* 384 F. Supp. 292 (C.D.

Finally, if this Court should determine that agencies have discretion to release information within the fourth exemption, a determination of the scope of the exemption is necessary to determine whether the discretion was abused. *See e.g., Pennzoil Co. v. F.P.C., supra,* 534 F.2d at 630-631. Since Congress has determined that the interests of the supplier protected by the fourth exemption outweigh the general public interest in disclosure, any agency decision to disclose information within the exemption should be deemed an abuse of discretion unless justified by extraordinary circumstances.[80]

Cal. 1974), *appeal pending,* No. 75-1064 (9th Cir.), the government conceded on appeal that the district court erred in determining that the information at issue was not within the fourth exemption – preferring to rely on its purported discretionary power to disclose notwithstanding the exemption rather than confronting the question of the scope of the exemption. In the instant case, the government did not contest the finding of the district court regarding the applicability of the fourth exemption. It is largely because of the government's position in these cases that the scope of the fourth exemption has not yet been properly defined.

[80] One commentator has suggested a showing that the *requester's* purpose be of "extraordinary public benefit". Project, 73 Mich. L. Rev. at 1161. *Amicus* submits that no such showing could be made in the instant case. Public scrutiny of AAP's would impair rather than promote the effective implementation of affirmative action programs. The self-appraisal required in AAP's regarding utilization of minorities and females in the workforce is an empty endeavor unless it is frank and critical; and the confidentiality of such an endeavor is the only means to assure that it will be undertaken vigorously. *See e.g., Dickerson v. United States Steel Corp.,* 12 E.P.D. ¶ 11,095 (E.D.Pa. 1976); *Sanday v. Carnegie-Mellon University, 11* E.P.D. ¶ 10,659 (W.D.Pa. 1975). Moreover, the establishment of goals and timetables for the employment and promotion of minorities and females (as opposed to impermissible "quotas") is, if nothing else, a delicate and difficult undertaking – with enormous potential for creating misunderstanding and even conflict among employees. Dissemination of detailed AAP information to the contractor's employees and the public would inhibit that undertaking.

This is no assertion of bad faith. It is simply a recognition that meaningful efforts by government contractors to implement affirmative action programs, involving as they do the extremely sensitive line between "color and sex-blindness" in

IV

BECAUSE THE AGENCY REGULATIONS HEREIN WHICH PURPORT TO AUTHORIZE DISCLOSURE OF INFORMATION WITHIN THE FOURTH EXEMPTION ARE FUNDAMENTALLY INCONSISTENT WITH THE INTENDED PURPOSE AND SCOPE OF THAT EXEMPTION, THEY CANNOT HAVE THE FORCE AND EFFECT OF LAW, AND DISCLOSURE OF INFORMATION WITHIN THE FOURTH EXEMPTION PURSUANT TO SUCH REGULATIONS IS NOT PROPERLY "AUTHORIZED BY LAW" UNDER 18 U.S.C. 1905.

Section 1905 of Title 18 of the U.S. Code prohibits any governmental official or employee from disclosing a broad range of private commercial and financial information obtained from private parties unless such disclosure is "authorized by law."[81] The court of appeals in the instant case held that the "disclosure regulations" contained in 41 C.F.R. Part 60-40[82] constituted such

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employment and "reverse discrimination", will be hampered by public disclosure of details of AAP's. Information taken out of context or only partially disclosed may provide grist for unfounded but costly private litigation. And goals too sharply set or problem areas too critically appraised might well leave a contractor open to such attack by "aggrieved parties" on both sides. *Cf. Weber v. Kaiser Aluminum & Chemical Corp.,* 563 F.2d 216 (5th Cir. 1977).

[81] Section 1905 prohibits government officers and employees from disclosing "to any extent not authorized by law":

". . . any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association . . . ."

[82] The disclosure regulations exempt from disclosure, in relevant part, only:

"(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or

"authorization by law" for the disclosure of the information here at issue and thereby rendered the section 1905 prohibition against disclosure inapplicable. *Chrysler Corporation, supra,* 565 F.2d at 1186-1188.

The court held that "[t]hough the OFCC[P] has no statutory enabling act, it is authorized to promulgate disclosure regulations under the so-called housekeeping statute, 5 U.S.C. § 301 . . ."[83] 565 F.2d at 1186. Since it found such authority for the promulgation of the disclosure regulations in section 301, the court did not decide whether such regulations could be deemed authorized by the Freedom of Information Act or by Executive Order 11246. *Id.* at 1188.

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financial information because they indicate, and only to the extent that they indicate that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public . . . .

"(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor . . . ." 41 C.F.R. § 60-40.3(a).

The disclosure regulations further provide that even exempt information should be withheld only "if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies." *Id.*

[83] Section 301 provides:

"The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

The court of appeals was incorrect in stating that *the OFCCP* is authorized to promulgate the disclosure regulations. Section 401 of Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1967), authorizes the Secretary of Labor to delegate his authority to the OFCCP "*except authority to promulgate rules and regulations of a general nature.*" (Emphasis added.) The prefatory comments to the disclosure regulations in the Federal Register also state, directly contrary to the above provision, that "[t]hese rules are issued pursuant to the general rule-making authority *of the OFCC[P]* under Executive Order 11246, as

Amicus submits that to the extent the disclosure regulations deprive private parties of the degree of protection Congress intended to preserve in enacting the fourth exemption, none of these purported sources of authority can properly infuse such regulations with the force and effect of law. Whether the disclosure regulations are considered "legislative rules" issued pursuant to a grant of legislative power,[84] "interpretive rules"[85] or something in between, they cannot have the force of law if they are fundamentally inconsistent with the statute they purport to implement.[86]

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amended by Executive Order 11375 and the authority *given to component units of the Department of Labor to issue supplementary regulations* governing the disclosure of particular or specific records which are in the custody of that departmental unit under 29 CFR 70.71." (Emphasis added.) 38 Fed. Reg. 3192-3193 (February 2, 1973). If these statements are taken at face value, the disclosure regulations are invalid.

[84] "Legislative rules" generally refer to rules issued pursuant to legislatively delegated power to make rules having the force of law. *See generally* 1 K. C. Davis, *Administrative Law Treatise* § 5.03 (1958); *see also e.g., Joseph v. United States Civil Service Commission,* 554 F.2d 1140, 1153 n. 24 (D.C. Cir. 1977).

[85] "Interpretive rules" or guidelines generally refer to rules which are not issued pursuant to legislatively delegated power to make rules with the force of law and which may or may not be entitled to deference by a court in determining the applicable law, depending upon their persuasive power. *See General Electric Co. v. Gilbert,* 429 U.S. 125, 141-142 (1976); *see generally* 1 K. C. Davis, *Administrative Law Treatise* § 5.03 (1958).

[86] As Professor Davis observed in his text:

"In the middle territory between the extremes, the key factor . . . is not presence or absence of delegated power to make rules having force of law, but it is judicial interpretation of the substantive meaning of the statute: When the court's own interpretation of the statute and legislative history leads it to the result provided for by the rule, the court will reach that result, and it need not decide whether the rule was within granted power, for the result is the same either way; similarly, if the court finds that the legislative materials call for a decision that is opposite to what the rule provides, the court need not decide whether the rule is legislative or interpretative, for it is invalid if it is legislative and superseded by the court's interpretation if it is interpretative." K. C. Davis, *Administrative Law Text* § 5.03 at 129 (3d ed. 1972).

The disclosure regulations are fundamentally inconsistent with the protective purposes of the fourth exemption in two respects. First, they purport to define the scope of the fourth exemption at least as restrictively as the court in *National Parks I* by exempting only *specified kinds of information*, the disclosure of which *would* injure the competitive position of the submitter.[87] Second, the disclosure regulations provide that such exempt information should be withheld only "if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCC or the Compliance Agencies."[88] To give such regulations the force and effect of law is effectively to nullify the congressional intent in enacting the fourth exemption and to confer legislative power upon the executive agencies.

In view of the fundamental inconsistency between the disclosure regulations and the statute they purport to implement, it is not surprising that the regulations are seriously deficient in other respects. The regulations were issued by publication in the Federal Register on January 23, 1973, expressly purporting, *inter alia*, to "implement 5 U.S.C. 552, the Freedom of Information Act . . . " 38 Fed. Reg. 3192, 3193 (February 2, 1973). They were issued without compliance with the "notice and comment" requirements of section 553 of the APA, 5 U.S.C. § 553, purportedly because they "relate solely to interpretive rules, general statements of policy, and to rules of agency procedure and practice."[89] *Id.* at 3193.

Although section 553 of the APA does not require adherence to its rule making procedures for the promulga-

[87] *See* note 82, *supra*.

[88] *Id.*

[89] To the extent that the disclosure regulations purport to define the substantive scope of the fourth exemption as applied to private employment data, they are neither "general statements of policy" nor "rules of agency procedure and practice".

tion of interpretive rules, statements of policy or rules of agency procedure and practice, it does require compliance for the promulgation of "legislative rules",[90] *Joseph v. United States Civil Service Commission*, 554 F.2d 1140, 1153-1154 (D.C. Cir. 1977), or the rule will be deemed invalid.[91] *See N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 763-766 (1969); *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1114 (D.C. Cir. 1974). Because the disclosure regulations were not promulgated pursuant to the notice and comment requirements of section 553, they cannot be valid legislative rules.

On the other hand, if the disclosure regulations are merely interpretive rules, they do not have the force and effect of law. *Joseph v. United States Civil Service Commission, supra*, 554 F.2d at 1153-1154 ns. 24 and 26; *Gibson Wine Co., Inc. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952); 3 Mezines, Stein and Gruff, *Administrative Law* § 18.02[5][b], 18-30 to 18-33 (1977). Interpretive rules are merely an agency's interpretation of a statute it is charged with implementing; such rules create no law and have no effect beyond that of the statute. *Pesikoff v. Secretary of Labor*, 501 F.2d 757, 763 n. 12

[90] 5 U.S.C. § 553(b)(B) provides that notice and hearing required by the APA is not applicable when the agency for good cause finds "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." However, according to section 553(b)(B), such findings must be incorporated and a brief statement of the reasons made in the rule issued. No such findings have been incorporated in the disclosure regulations of 41 C.F.R. Part 60-40; nor is there any evidence of good cause to avoid the procedural requirements of section 553.

[91] *Amicus* does not suggest that the disclosure regulations could be valid legislative rules even if properly promulgated pursuant to the APA. Neither the Freedom of Information Act, the "housekeeping statute" (5 U.S.C. § 301), nor the Executive Order can reasonably be read as delegating (expressly or impliedly) the power to make substantive rules with the force of law regarding the disclosure of private business information, much less rules which contradict the provisions of the Freedom of Information Act.

(D.C. Cir.), *cert. denied,* 419 U.S. 1038 (1974); 1 K. C. Davis, *Administrative Law Treatise* § 5.03 (1958). It would therefore appear that disclosure pursuant to an interpretive rule cannot constitute disclosure "authorized by law" within the meaning of 18 U.S.C. § 1905.

Finally, interpretive rules are, in certain instances, deferred to by the courts because they constitute a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). However, such deference is warranted only where an interpretive rule demonstrates: "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140; *accord, General Electric Co. v. Gilbert,* 429 U.S. 125, 141-142 (1976).

The disclosure regulations do not hold up under these standards. With respect to the thoroughness of consideration, the failure to adhere to the formal notice and comment requirements precluded adequate consideration of the private interests protected by the fourth exemption. Although the APA does not require notice and comment procedures for interpretive rules and statements of policy, 5 U.S.C. § 553(b)(A), such procedures should have been followed in view of the enormous impact of the disclosure regulations upon the rights of private submitters of AAP information. *See generally* K. C. Davis, *Administrative Law of the Seventies* §§ 6.02-7 and 6.01-8 and cases cited therein (1976); *see also* Koch, *Public Procedures for the Promulgation of Interpretive Rules and General Statements of Policy,* 64 Geo. L. J. 1047, 1059 n. 24 (1976). Where such regulations purport to define the degree of protection to be afforded the privacy and competitive interests of private parties, fundamental fairness demands some degree of participation by the

private parties in their formulation. *Id.; see also Joseph v. United States Civil Service Commission, supra,* 554 F.2d at 1154 n. 26; *Pickus v. U.S. Board of Parole, supra,* 507 F.2d at 1112-1113. Regulations promulgated without such input are not entitled to deference by this Court.[92]

With respect to the validity of the reasoning, the most critical weakness of the disclosure regulations is their fundamental inconsistency with the Act they purport to implement.[93] To the extent such regulations improperly restrict the intended protective purpose of the fourth exemption, they are unreasonable and not entitled to deference by this Court.

For all of the foregoing reasons, the disclosure regulations cannot have the force and effect of law. Accordingly, disclosure of information of the kind described in 18 U.S.C. § 1905 pursuant to such regulations is not "authorized by law" within the meaning of that statute.

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[92] The informal notice and comment procedure adopted for the disclosure regulations (allowing 45 days for comment on the regulations *after* they had been issued), 38 Fed. Reg. 3193 (February 2, 1973), is inadequate in view of the breadth and degree of impact upon private parties.

[93] Such regulations are also unreasonable (1) in relation to 18 U.S.C. § 1905, inasmuch as they purport to allow federal employees and officers to define or redefine the scope of their own permissible conduct under section 1905 in accordance with their perception of the "public interest"; and (2) in relation to section 709(e) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-8(e), inasmuch as they purport to authorize disclosure of the same (and similar) information as that prohibited from disclosure by the Equal Employment Opportunity Commission under section 709(e). *See Chamber of Commerce v. Legal Aid Society,* 423 U.S. 1309, 1310-1312 (1975) (Douglas, J., denying motion for a stay).

CONCLUSION

For the reasons set forth above, *Amicus* submits that the judgment of the court of appeals should be reversed insofar as it holds (1) that information within the fourth exemption to the Freedom of Information Act, 5 U.S.C. § 552(b)(4), may be released to the public by the government; and (2) that the disclosure regulations set forth in 41 C.F.R. Part 60-40 constitute "authorization by law" within the meaning of 18 U.S.C. § 1905.

In the process of ruling on these issues, the Court should confirm that the fourth exemption was intended by Congress to preserve the confidentiality of all information not customarily disclosed to the public by private submitters. The extent of judicial review should be defined by the Court to assure the effective preservation of the privacy and competitive interests which Congress intended to protect in enacting the fourth exemption.

DATED: June 2, 1978.

Respectfully submitted,

LATHAM & WATKINS
THOMAS L. PFISTER
GEORGE H. WU
555 South Flower Street
Los Angeles, California 90071